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In the Supreme Court of the United States

No. 73-171

DOROTHY DAVIS BARR, et al.,
Petitioners,

vs.

UNITED STATES OF AMERICA, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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No. _____

DOROTHY DAVIS BARR, et al.,
Petitioners,

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UNITED STATES OF AMERICA, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above-entitled action on April 30, 1973.

OPINION BELOW

The opinion of the Court of Appeals is not yet officially reported. It is appended hereto as Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on April 30, 1973. The jurisdiction of this Court is invoked under Title 28, U.S.C.A., Section 1254 (1).

QUESTIONS PRESENTED

I. Whether the complaint states sufficient facts to establish that the Court had jurisdiction under Section 28 U.S.C.A., 1361 against the Secretary of Labor wherein it alleged that an officer of the United States had refused to perform a duty owed to the petitioner as required by a specific statute of the United States as well as a right protected by the Fourteenth Amendment of the United States Constitution.

II. Whether the complaint states sufficient facts to establish that the Court had jurisdiction under Section 42 U.S.C.A., 1983 against the named officers of the States of New Mexico and New York for themselves, or as agents for each other, wherein it alleged they were acting under color of state statutes and caused the petitioner in the State of New Mexico to be deprived of rights secured by the Constitution and Statutes of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved, all of which are set forth in Appendix A, are:

Constitution of the United States, Fourteenth Amendment.

42 U.S.C.A. 503 (a) (3)

28 U.S.C.A. 1254 (1)

28 U.S.C.A. 1361

42 U.S.C.A. 1983

STATEMENT OF THE CASE

The factual details outlined in the opinion of the Court of Appeals are correct except for the following:

1. The Court of Appeals stated (opinion, pg. A4) that petitioner Barr's Unemployment Insurance claim was rejected by New York on the ground that she had left her employment voluntarily, however, this should be corrected to add that New York disqualified her for leaving her work voluntarily without good cause, and that she timely appealed this decision (Vol. I pg. 6) under New York Statutes granting her a hearing (§ 620 (1) and § 622 (2), Labor Code, Consolidated Laws of New York annotated) (Vol. I pgs. 11-12) (Second paragraph of the complaint).

2. The appellant did not in her complaint as the Court of Appeals stated (opinion, pg. A5) assert extraterritorial jurisdiction in New Mexico (that she was entitled to require the employer's witnesses to be subpoenaed and brought to New Mexico for cross-examination) but alleged only that she sought information and assistance from the New Mexico agency on the hearing procedures that would be followed in New Mexico (Vol. I pg. 6) so that she could have a hearing as is required by State and Federal Statutes and the Constitution of the United States, which statutes did not except her rights to a hearing because she was not in the State of New York. She was then informed that under interstate procedures of the defendant New Mexico Commission as agent for defendant New York, promulgated by defendant Secretary, she would not receive a hearing but only be allowed to submit sworn statements (Vol. I pgs. 16-17).

3. The Court stated there is nothing in the New York, New Mexico or Federal Statutes that authorizes an "out

of state" hearing for a moving claimant (Op. pg. A8) which is not correct in that § 42 U.S.C.A., 503 (a) (3) and § 620-2 Labor Code of New York provide for a hearing for a Claimant without geographic restrictions which under the National System and rules and regulations is necessary.

The complaint stated that the States and the Secretary could by simple and economic changes allow the state referees in the state of claimant's domicile to give claimant a fair hearing before an impartial tribune (Vol. I pg. 8) (paragraph No. 5 of the complaint).

There are special and important reasons to grant the writ in this case in that the basic issue in the case is of national import and involves a class of persons intended to be aided at a time when they are in urgent need and who after being denied benefits provided by law, are not given a hearing to correct errors merely because they are not physically present in the same state as their previous employers who are granted a hearing. The present system of Unemployment Insurance benefits is a national system funded by federal taxes under federal guidelines for each state and requires a fair hearing to those who are unemployed through no fault of their own and who have been denied benefits.

To get this issue before a court, the right to sue federal officers under 1361 and state officers under 1983 must be established. Since enactment in 1962 of 28 U.S.C.A. § 1361, conflicts in the decisions of various Federal Courts have arisen on the right to sue and mandate federal officers and litigants and the courts are in great need of having these questions settled by this court, which has been silent on the meaning, impact and effect of the new section.

The Court of Appeals found that there was no jurisdiction under Section 1361, as well as all other sections cited, finding that the complaint failed to state facts which would make available relief in the nature of mandamus since the court found that it alleged discretionary acts of the Secretary of Labor in relation to state administration of Unemployment Compensation laws and regulations.

This was the first time that the consensual item surfaced in that the lower court had dismissed the case principally upon the ground that the petitioner had failed to exhaust administrative remedies. The Court of Appeals stated that it did not reach this issue although it was briefed and argued and under present decisions there is no doubt that the lower court erred in its exhaustion ruling (3 Davis Administrative Law Treatise § 20.02).

Section 42 U.S.C.A., 503 (a) (3) places a duty on the Secretary to require states to include provisions for a fair hearing before an impartial tribune for all individuals whose claims for unemployment compensation are denied. The Secretary's act of certification of states for eligibility to participate in the federal distribution of unemployment tax funds under this statute is not a discretionary act. The eligibility factors for certification are clear and if a state does not provide a claimant a fair hearing, it is in violation of the act. This same federal statute does provide a hearing for states contesting the Secretary's decertification, but that process is not involved here (42 U.S.C.A., 504). This court has recently found that the act's administrative remedies as to states are not exclusive and that claimants may enforce its requirements directly. *Java* v. *Department of Human Resources Development,* 402 U.S. 121, 91 S.Ct. 1347, 28 L.Ed. 2d 666 (1972).

A fair hearing is an event, and this event is clear, definite and defined. A hearing is a fact. It is, or it isn't and where the complaint states it isn't, it states facts which if proven put the Secretary in violation. It is not a question of his discretion, it is a question of fact and if proven, gives grounds for relief. This the Appeals Court ignores and in essence decides the case in advance of a hearing on the merits finding no jurisdiction.

REASONS FOR GRANTING WRIT

1. The Court of Appeals erred in holding that the petitioners had not sufficiently stated facts to constitute a claim within the jurisdiction of the court under Section 28 U.S.C.A., 1361 and Section 42 U.S.C.A., 1983.

ARGUMENT

I. The petitioners did state facts sufficient to establish jurisdiction against a federal officer in the United States District Court.

Section 1361 has not been construed, interpreted or explained by this court since its enactment by the Congress in 1962. In that period well over fifty decisions of various United States Courts have been handed down with conflicting results as to the meaning, intent and effect of Section 1361. This court has denied Certiorari in a number of cases involving this section, however, these are not of assistance to litigants and courts in understanding Section 1361. A sample of these decisions shows a wide difference in the lower courts' approach and meaning of Section 1361. Some that arrived at the conclusion that 1361 provided jurisdiction and that the intent of Congress was to establish that the sovereign had consented to actions to require officers to perform their duties, found no great ministerial versus discretion difficulty and concluded that it was the intent of Congress to make available a remedy that had been previously withheld or had been enjoyed only in the District of Columbia. *Ashe* v. *McNamara,* (1st Cir. 1965) 355 F.2d 277; *Knoll Assoc.* v. *Dixon,* (DC NY 1964) 232 F. Supp. 283; *Cortright* v. *Resor,* (DC Ed. NY 1971) 325 F. Supp. 797, Rev. O/G, Cert. denied 405 U.S. 965, 3 L.Ed. 2d 240, 92 S.Ct. 1172; *Carey* v. *Local Bd. No. 2, Hartford Connecticut,* (US DC Conn. 1969) 297 F. Supp. 252, Affrd. 412 F.2d 71; *Feliciano* v. *Laird,* (U.S.C.A. 2nd Cir. 1970) 426 F.2d 424; *Grosfeld* v. *Morris,* (4th Cir. 1971) 488 F.2d 1004; *Nat'l Assn. of Govt. Employees* v. *White,* (DC Cir. 1969) 418 F.2d 1126; *Marquez* v. *Hardin,* (U.S. DC N. Calif. 1969); *Peo-*

ples v. *United States Dept. of Agriculture,* 138 U.S. App. DC 291, 427 F.2d 561 (1970).

Taking an opposite stand a number of other courts were equally convinced that either the act of the government official was in fact a discretionary act not mandatable under classic mandamus doctrine or found that even though it might not have been discretionary, defendant officials were entitled to immunity for various other reasons. *McQueary* v. *Laird,* (10th Cir. 1971) 449 F.2d 608 (cited by the court below); *Smith* v. *U. S.,* (10th Cir. 1964) 333 F.2d 70; *McEachern* v. *United States,* (12 CWD SC 1963) 212 F. Supp. 706; *Rose* v. *McNamara,* (ED Pa.) 255 F. Supp. 891; *U. S.* v. *Comm. of Pa.,* (9th Cir. 1965) 343 F.2d 444; *Davis* v. *Schultz,* (3rd Cir. 1971) 453 F.2d 497; *Prairie Band of Pottawatomie Tribe of Indians* v. *Udall,* (10th Cir. 1966) 355 F.2d 364; *Armstrong* v. *U. S.,* (9th Cir. 1965) 354 F.2d 648; *Jarrett* v. *Resor,* (9th Cir. 1970) 426 F.2d 213. Professor Byse in discussing this subject in 81 Harvard Law Review 308, at page 354, states that 1361 actions must always look to the nature of the action sought to be mandated to determine the extent of the value of the ministerial vs. discretionary distinction and counsel should be diligent to prevent a "busy judge" from being misled by these distinctions. At page 334, the author suggests that this type of distinction is unworkable and should be rejected.

The whole area requires the attention of this Court. The reasoning in *Marbury* v. *Madison,* (1803) U.S. (1 CR) 137, 170, wherein it was stated "It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety of issuing a *mandamus* is to be determined" penetrates the superficialities of discretion vs. ministerial distinctions and in view of the wording of the statute that speci-

fies actions "in the nature of mandamus," those decisions seeking to avoid jurisdiction and to find immunity using the classic mandamus ministerial-discretionary test should be laid to rest. If the nature of the act sought to be compelled is a clear violation of an ultimate existing legal duty owed the plaintiff, the nature of the act should be determinative whether there is in fact a legal duty or merely a claimed right that is superceded by other legal rights and obligations, not whether the officer is exercising discretion. Clearly where the executive is granted a degree of latitude in action, a party cannot claim a duty where only one or more of the alternatives would favor the proponent. The duty must be clear and ultimate. Courts should not evade jurisdiction by fears of encroachment but should be governed by facts and legal rights. Immunity of the sovereign has been and is a fading doctrine. No one today would adhere to the oft quoted law school maxim that the king can do no wrong. The king can do wrong and does and is in court frequently because of this.

For the past 30 years Congress has been expanding this liability and 1361 should now be viewed in this light so that its clear language and the function of a court may be exercised rather than restricted on the basis of case materials no longer applicable. This takes more than a cursory glance at pleadings. The full weight of the Judicial System should be available to determine if a Government official has in fact failed to perform a duty to the plaintiff and, if so, to right the wrong. If evasions such as are now practiced under classic theories of mandamus are allowed to go unchecked, government officials are free to breach their duty if the damages are less than $10,000 or some other grounds cannot be found. This is a false concept of justice and the intent of Congress to

give District Courts jurisdiction as the plain words of the statute proclaim. To read into 1361 restrictions and limitations based upon portions of the Congressional Record that would say that it was the intent of Congress to merely broaden venue conflict with its title and specific wording. To say it created no new tools or remedies is to infer that they already existed. Likewise to say that this existed in the District Court of the District of Columbia under its historical Maryland origin is to ignore the broad interpretation that that Court has given to its version of its jurisdiction. It is now necessary to face up to the problem and resolve it so that 1361 may fully serve its purposes.

Therefore, in accord with this court's traditional sense of justice in resolving conflicting decisions of lower Federal Courts and in the interest of bringing justice to litigants and much needed enlightenment to the judicial system it is incumbent that this court grant Certiorari and enlighten the lower courts as well as litigants on the proper use and meaning of Section 1361.

II. The court erred in finding that the complaint failed to state a claim against the states for violations of the petitioners' constitutional and statutory rights.

This court has recently, frequently and traditionally found that the courts of the United States have jurisdiction to hear invasions of individuals' statutory and constitutional rights under the Civil Rights Statutes of the United States if committed by state officials who do not enjoy federal immunity to suit and this court has, in cases of significant interest and nationwide impact, found that parties whose rights were abused by State officials were entitled to redress (*Java* v. *Department of Human Resources Development,* supra).

The Circuit Court is not as didactic on its dismissal against the states under Section 42 U.S.C.A., 1983 as it is against the federal officers under 28 U.S.C.A., 1361, concluding without stated reasons that petitioner has failed to plead a deprivation of a federally protected right (Op. pg. A9). To say this, the court is sustaining the lower court's finding that the complaint does not allege constitutional questions sufficient to merit a three judge court as requested. The complaint does allege violations of constitutional and federally protected rights which in this case are of a far reaching national import not only affecting petitioner but numerous others throughout the U. S. This court and the Three Judge District Court of the Northern District of California had no trouble in seeing that a violation of 42 U.S.C.A., 503 (a) (3) and the Fourteenth Amendment to the U. S. Constitution in Unemployment Insurance cases merited three judges and jurisdiction and enjoined a state from such violations; *Java* v. *California,* supra. As the lower court in that case noted, "the most fundamental purpose of *both* (emphasis supplied) the federal and the state unemployment compensation laws is to prevent the burden of injured employees becoming charges upon Society. *Abelleira, et al.* v. *District Court of Appeal, et al.,* 17 Cal. 2d 280, 300, 109 P.2d 942, 953 (1941)," *Calif. Dept. of Human Resources Develop.* v. *Java et al.,* 317 F. Supp. 875. Petitioner does have rights under the Federal Statute against both the Secretary and the State of New York and its local admitted agent, New Mexico. If there was a question as to this agency, this should have been resolved in the lower court, but the allegations of the complaint clearly establish its existence (Ex. "D" Vol. I pgs. 16-17).

The petitioner at no time alleged or claimed that personal service on New York was obtained by mailing, but

did allege the agency of New Mexico, the acts in New Mexico and service upon the New Mexico Commission as agent of New York in New Mexico and the Circuit Court admits and recognizes such allegations (Op. pg. A5) and in the next breath finds no state action that creates any rights. The court also pays lip service to Petitioner's rights in New Mexico to invoke the New Mexico Commission's jurisdiction (Op. pg. A6) and then admits its own failure to find jurisdiction seemingly upon a ground of the lack of extra-territorial jurisdiction of states and then states that "The complaint is not free of ambiguity" (Op. pg. A8). The court was on the one hand admitting rights and state action and that possibly the complaint did state facts and on the other hand affirming the District Court that held that the complaint did not state sufficient facts to raise constitutional issues or state a claim in violation of federally protected rights.

The Circuit Court's blanket affirmation of the District Court's blanket denial of all requested relief is in error and so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

CONCLUSION

For the reasons stated, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Bernalillo, New Mexico 87004
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APPENDIX A

Constitution of the United States—Fourteenth Amendment:

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C.A., 503 (a) (3)

(a) The Secretary of Labor shall make no certification for payment to any State unless he finds that the law of such State, approved by the Secretary of Labor under the Federal Unemployment Tax Act, includes provision for . . .

(3) Opportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied; and . . .

28 U.S.C.A., 1254 (1)

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . .

28 U.S.C.A., 1361

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

42 U.S.C.A., 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress.

APPENDIX B

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

SEPTEMBER 1972 TERM

No. 71-1740

DOROTHY DAVIS BARR, Individually and for and on behalf of all others similarly situated,
Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA, James D. Hodgson, Secretary, Department of Labor; EMPLOYMENT SECURITY COMMISSION OF NEW MEXICO, Louis R. Bachicha, Chairman-Executive Director; NEW YORK STATE DEPARTMENT OF LABOR, Louis L. Levine, Industrial Commissioner,
Defendants-Appellees.

Appeal from the United States District Court
for the District of New Mexico

William J. Torrington, Bernalillo, New Mexico, for Appellant.

Ronald R. Glancz (L. Patrick Gray, III, Assistant Attorney General, Victor R. Ortega, United States Attorney, Morton Hollander, Thomas J. Press, Attorneys, Department of Justice, Washington, D. C. 20530, on the brief) for Appellee United States.

R. Baumgartner, Attorney for Employment Security Commission of New Mexico, Albuquerque, New Mexico, Appellee.

Before JONES*, SETH and BARRETT, Circuit Judges.

JONES, Circuit Judge:

The appellant, Dorothy Davis Barr, brought an action in the District Court for the District of New Mexico, against the United States and the Secretary of Labor; the Employment Security Commission of New Mexico and its Chairman-Executive Director; and against the Industrial Commissioner of the New York State Department of Labor. Federal jurisdiction is asserted under 28 U.S.C.A. § 1346(a)(2), 28 U.S.C.A. § 1361, 42 U.S.C.A. § 1983, 42 U.S.C.A. § 1988, 28 U.S.C.A. §§ 2201-2202, and Rule 57 Fed. Rules Civ. Proc. The appellant undertook to sue individually and on behalf of a class consisting of all other persons similarly situated.

In her complaint the appellant alleged that she had terminated an employment in New York, moved to New Mexico, filed a claim with the Employment Security Commission of New Mexico for unemployment insurance benefits under the laws of New York; that New York had rejected her claim on the ground that she had left her employment voluntarily. She was informed, so it was alleged, that pursuant to the interstate appeals procedure, a New Mexico referee would take and record her testimony and receive any other evidence she desired for transmission to New York where a referee of that state would consider such testimony and evidence with the evidence brought before him by the former employer and make a decision. The appellant asserted that she was

*Of the Fifth Circuit, sitting by designation.

entitled to require the employer's witnesses to be subpoenaed and brought, for the taking of their testimony, from New York to New Mexico where they would be subject to cross-examination by her. She claimed that to follow the procedures as outlined by the two states, although in accordance with the interstate appeals agreements and the pertinent state regulations, would result in a denial of her constitutional due process rights and of the Federal statute which requires that "the Secretary of Labor shall make no certification for payment to any State unless he finds that the law of such State . . . include provision for . . . opportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment are denied . . ." 42 U.S.C.A. § 503(a). Her claim was also predicated upon the statutory requirement that unemployment compensation should not be denied to a claimant or reduced ". . . solely because he files a claim in another state . . . or because he resides in another state . . . at the time he files a claim for unemployment compensation." 26 U.S.C.A. § 3304(a)(9)(A). The prayer of the complaint sought "the Court's order for declaratory relief and an injunction enjoining the Secretary of Labor, the Employment Security of New Mexico, and the New York State Department of Labor, from further failing, refusing, or neglecting to provide claimants with an opportunity for a fair hearing before an impartial tribunal or Court in claimant's domicile. . . ."

After obtaining leave to proceed in forma pauperis, the appellant filed a double-barreled motion seeking first, leave to proceed under Rule 23 Fed. Rules Civ. Proc. as the representative of a class consisting of interstate claimants of unemployment compensation benefits, and second, the convening of a three-judge court as provided by 28 U.S.C.A. §§ 2281, 2282 and 2284.

The court granted the motion of New York State Industrial Commissioner to dismiss the complaint for lack of jurisdiction, the motion of Employment Security Commission of New Mexico and its Chairman-Executive Director to dismiss the complaint for failure to state a claim upon which relief could be granted, and the motion of the United States and its Secretary of Labor to dismiss the complaint for failure to exhaust administrative remedies and failure to state a claim upon which relief could be granted. The court also ordered that the complaint and the cause of action be dismissed with prejudice as to all defendants. This appeal followed.

The New Mexico Commission has filed in this Court a motion reciting that the appellant has ceased to be a resident of New Mexico and seeking the dismissal of the appeal as moot. Attached to the motion is a copy of a writing purporting to be a letter from the appellant to her attorney. In this instrument the writer gives her "home address" as a street number in Helena, Montana. In the letter its writer talks about her "job." The letter is the sole basis for the assertion of mootness. Assuming the authenticity of the letter which, although not admitted, is not denied, it fails to establish that there has been, in fact, a change of residence. We do not find it necessary to decide whether a change of residence would deprive the appellant of any right afforded her under interstate appeals procedures. She had a right to invoke the jurisdiction of the New Mexico Commission at the time she sought relief from it, and we need not decide whether the right has been lost, however mistaken she was as to the nature and extent of her rights in the interstate proceedings. We suppress the urge to discuss the doctrine of mootness and proceed to the issues which were decided by the district court.

Jurisdictional questions are usually entitled to initial consideration, and are to be noticed whether or not they are raised. The United States was dismissed on the grounds that administrative remedies had not been exhausted and for failure to state a claim upon which relief could be granted. We pretermit consideration of the administrative remedy question. This Court has had no greater success than did the district court in finding any basis for a claim upon which relief could be granted against the United States. It seems clear that there is no jurisdiction over the United States. The appellant asserted jurisdiction under 28 U.S.C.A. § 1346(a)(2), 28 U.S.C.A. § 1361, 42 U.S.C.A. § 1983, 42 U.S.C.A. §1988, 28 U.S.C.A. §§ 2201-2202 and Rule 57 Fed. Rules Civ. Proc.

Section 1346(a)(2) gives to district courts concurrent jurisdiction with the Court of Claims in a limited amount. The statute is applicable only to money claims against the United States. United States v. Jones, 131 U.S. 1, 19 S.Ct. 669, 33 L.Ed. 90. The district court was correct in its determination that no claim was asserted against the United States upon which relief could be granted, but the complaint might well have been dismissed against it on jurisdictional grounds.

Section 1361 confers jurisdiction "in the nature of mandamus to compel an officer . . . of the United States . . . to perform a duty owed to the plaintiff." The functions of the Secretary of Labor in relation to state administration of unemployment compensation laws and regulations are, to the extent the appellant would have the Secretary coerced by the court, discretionary. Mandamus, including the statutory remedy provided by Section 1361, will not lie to direct the manner in which discretionary acts of governmental officials are to be performed nor to direct or influence the exercise of discre-

tion in making such decisions. McQueary v. Laird, 10th Cir. 1971, 449 F.2d 608. No other relief was sought against the Secretary. The district court was correct in its determination that the complaint stated no claim against him upon which relief could be granted.

The Industrial Commissioner of the State of New York was dismissed by the district court for lack of jurisdiction. The decision was correct. Service of process was attempted by certified mail. No authorization for such service is provided by any statute or rule of the United States or of the State of New Mexico. See Rule 4(f) Fed. Rules Civ. Proc.

The complaint named as defendants the New Mexico Employment Security Commission and its Chairman-Executive Director. As to them the complaint was dismissed on the ground that no claim was stated upon which relief could be granted. Although the complaint is not free of ambiguity, it is apparent that the appellant sought to have the New Mexico Commission subpoena witnesses from New York to appear personally before it, to conduct a hearing, to make findings and enter an order against the State of New York for the payment of unemployment compensation to her. As to this position it is enough to say that there is nothing in the law of the United States, of New York or of New Mexico that authorizes such procedure. The interstate appeals procedure permits the taking of testimony before the Commission in the state of a claimant's residence and the transmitting of such testimony to the state against which the claim is asserted. With this the appellant was not content; but to more she was not entitled.

Only brief consideration need be given to the other statutes upon which the appellant relies. Section 42

U.S.C.A. § 1983 provides a Federal remedy for a denial or deprivation of a federally protected right by a state or state agency. The failure of New Mexico to provide a forum to adjudicate a claim against the state of New York is not within the purview of Section 1983. Reliance upon 42 U.S.C.A. § 1988 is also misplaced. This section does not create rights nor confer jurisdiction. Declaratory judgment relief is made available to Federal litigants by 28 U.S.C.A. §§ 2201-2202 and Rule 57 Fed. Rules Civ. Proc. They do not create jurisdiction.

The district court properly refused to treat this as a class action and properly rejected the application for the convening of a three-judge court.

The judgment of the district court is correct. It is AFFIRMED.

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In the Supreme Court of the United States

No. 73-171

DOROTHY DAVIS BARR, et al.,
Petitioners,

vs.

UNITED STATES OF AMERICA, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

Employment Security Commission of New Mexico

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE
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BRIEF FOR RESPONDENT IN OPPOSITION

Employment Security Commission of New Mexico

OPINION BELOW

The opinion of the Court of Appeals is not officially reported. It is appended hereto as Appendix B.

JURISDICTION

Petitioner asserts jurisdiction in this Court under Title 28, U.S.C.A., Section 1254 (1).

QUESTIONS PRESENTED

Whether the Complaint states sufficient facts to establish that the named officers of the states of New Mexico and New York for themselves, or as agents for each other, caused the Petitioner in the state of New Mexico, under color of State Statutes, to be deprived of rights secured by the Constitution and Statutes of the United States as provided in Title 42, U.S.C.A., 1983.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved, all of which are set forth in Appendix A, are:

Constitution of the United States, Fourteenth Amendment

42 U.S.C.A. 503 (a) (3)

28 U.S.C.A. 1254 (1)

42 U.S.C.A. 1983

This Respondent expresses no view as to the applicability of Title 28, U.S.C.A., Section 1361 cited in Petitioner's Brief.

STATEMENT OF THE CASE

1. Petitioner was a resident of the state of New York and was employed by a New York employer. After termination of her employment in New York, she moved to the state of New Mexico and filed a claim for unemployment benefits through the New Mexico agency against the state of New York. The New York Department of Labor issued a Notice of Determination to Petitioner disqualifying her from receipt of benefits pursuant to New York law because

she left her work voluntarily and without good cause (Vol. I, p. 11). Petitioner thereafter filed a timely appeal to this Determination with the New York Department of Labor through the New Mexico agency and a Notice of Hearing before a New Mexico appeals referee was sent to her on April 13, 1971 (Vol. I, p. 13). At this point the Petitioner ceased any further participation in the interstate appeals process other than to request some information on interstate procedures from the New Mexico Appeals referee (Vol. I, pgs. 15, 16, 17).

2. At all times material hereto the New Mexico agency was ready and willing to extend assistance to and provide procedures for the Petitioner, which were within the scope of its jurisdictional power, to perfect her appeal to the Determination of the New York State Department of Labor. These procedures included the holding of a hearing of record to take her full testimony, the acceptance into the record for transmittal to New York of any tendered documentary evidence, assistance in requesting testimony, evidence and claim file records in the possession of the New York agency, transmission of interrogatories or any other act which would enhance a fair consideration by the New York referee of the issue on appeal (Vol. I, pgs. 16, 17).

3. On motion to the District Court for the District of New Mexico, the Petitioner moved for an order pursuant to rule 23 (c) 1 of the Federal Rules of Civil Procedure that this action proceed as a class action and that the Chief Judge of the Circuit convene a statutory three-judge court in accordance with the provision of Title 28, U.S.C., 2281, 2282 and 2284 (Vol. I, p. 24). The interstate appeals process is available to all parties interested in the matter at issue. Manifestly, interstate appellants may be employers as well as claimants; the matters at issue for different claimants can vary widely and may require significantly

differing degrees of "due process" to protect the claimant's interest; and in using the interstate procedures many claimants are successful in their appeals and find no lack of fairness and convenience in the process. In its order, dismissing the Petitioner's Complaint, the judge of the District Court denied the Petitioner's Motion that this matter proceed as a class action for the reason that there was no showing that the Petitioner's claim was typical of the class she was seeking to represent or that there were questions of law and fact common to the alleged class. The decision of the judge of the District Court was correct. There is no class definitively described in Petitioner's Complaint of which she can fairly be said to be typical or representative and Petitioner has not raised this issue in this appeal.

4. Although commonly referred to as "agent state" in the procedures regulating interstate claims promulgated by the Interstate Conferences of Employment Security Agencies (Vol. I, p. 18) and in the regulations of various states, no substantive power is conferred on New Mexico to bind, in any way, the sovereign state of New York as a principal.

5. There is no statute in the laws of New Mexico or New York, or no federal statute which authorizes the state of New Mexico to issue subpoenas or other process to compel the appearance of New York residents as witnesses, or to compel the production of documents, papers or other evidence situated in New York in an administrative proceeding in New Mexico.

ARGUMENT

I. The Courts Below Were Correct in Finding That the Complaint Failed to State a Claim Against the State of New Mexico and New York for Violation of the Petitioner's Constitutional and Statutory Rights.

The respondent, Employment Security Commission of New Mexico, based its motion to dismiss in the District Court on three counts: that the complaint on its face failed to state a claim upon which relief could be granted because it failed to raise a substantial claim under the Constitution or any laws in the United States, including any claim relating to deprivation of rights or privileges secured to the Petitioner pursuant to 42 U.S.C. 1983; that the Petitioner's claim on its face failed to state facts sufficient to support a claim upon which relief can be lawfully granted by the Respondents; that the Court should dismiss this action as a premature judicial interruption of the administrative process because the Petitioner has not reasonably attempted to exhaust the administrative procedures still available to establish her eligibility for unemployment compensation benefits. These points still apply and go to the essence of the Court's decision on the propriety of granting the Petitioner's Writ.

Petitioner moved in the District Court for the convening of a statutory three-judge court (Vol. I, p. 3). In ruling on the substantiality of federal constitutional questions for convening three judges, courts should be guided in part by this Court's opinion in *Oklahoma Gas & E. Co. v. Oklahoma Packing Co.*, 292 U.S. 386, 54 S. Ct. 732, 78 L. Ed. 1318:

> "The three-judge procedure is an extraordinary one, imposing a heavy burden on federal courts, with at-

> tendant expense and delay. That procedure, designed for a specific class of cases, sharply defined, should not be lightly extended."

To sustain the jurisdiction of a three-judge court, an issue of unconstitutionality under the Federal Constitution must be raised. 28 U.S.C. §§2281, 2282; *Phillips* v. *U. S.*, 312 U.S. 246 at 250, 61 S. Ct. 480 at 483, 85 L. Ed. 800; *Ex Parte Bransford*, 310 U.S. 354, 60 S. Ct. 947, 84 L. Ed. 1249; *Swift & Co.* v. *Wickham*, 382 U.S. 111, 86 S. Ct. 258, 15 L. Ed. 2d 194; Annotations: 4 L. Ed. 2d 1940; 15 L. Ed. 2d 915. To justify three judges it must be contended that a statute is unconstitutional, and the constitutional question must be a substantial one. *Swift & Co.* v. *Wickham*, supra; *Wm. Jameson & Co.* v. *Morgenthau*, 307 U.S. 171, 59 S. Ct. 804, 83 L. Ed. 1189; *Cal. Water Service Co.* v. *Redding*, 304 U.S. 252, 58 S. Ct. 865, 82 L. Ed. 1323. Where the suit is also brought on non-constitutional grounds, the court should consider the substantiality of only the constitutional question when deciding whether three judges are warranted. *Swift & Co.* v. *Wickham*, supra; *Phillips* v. *U. S.*, supra.

A constitutional question is insubstantial if it is obviously without merit or if its unsoundness clearly results from previous Supreme Court decisions on the subject. *Cal. Water Service Co.* v. *Redding*, supra. *Utica Mut. Ins. Co.* v. *Vincent*, 375 F. 2d 129 at 131 n. 1 (C.A. 2, 1967), cert. den. 389 U.S. 839, 88 S. Ct. 63, 19 L. Ed. 2d 102.

The Petitioner's claim is obviously without merit. It simply alleges that the Petitioner will be denied due process. However, a careful reading of the complaint shows that it in fact alleges no deprivation of Petitioner's constitutional right to due process of law; it only alleges that the interstate appeals hearing fails to alleviate an inconvenience to Petitioner which is common to all parties who

are required to appeal an action in a distant forum of competent and exclusive jurisdiction. There is no showing that complete due process of law is not available to Petitioner in the normal New York benefit appeal process or that the interstate appeals process does not substantially expand her opportunity to have a hearing for which she would otherwise be forced to return to New York. Stripped of its constitutional verbiage, there remains a bare complaint that the New York agency will not send a complete trial forum to Petitioner no matter where she chooses to go. The Petitioner's argument, that because she "has clearly alleged a violation of her constitutional rights," she is entitled to a three-judge court is therefore without merit because it raises a constitutional question in mere words while in fact it has no substance and was property dismissed. *Williams* v. *Miller*, 48 F. Supp. 277 (D.C. Cal., 1942), aff'd 317 U.S. 599, 63 S. Ct. 258, 87 L. Ed. 489, reh. den. 318 U.S. 799, 63 S. Ct. 558, 87 L. Ed. 1163.

The Constitution does not require a particular form of hearing; it requires no more than a fair hearing. The interstate appeals process does provide for the fairest possible hearing before an impartial referee consistent with the due process clause. The due process clause does not guarantee any particular form of hearing procedure, and it does not require under *all* circumstances that factual determinations be made by the administrative officer hearing the evidence. *Utica Mut. Ins. Co.* v. *Vincent*, supra; *Inland Empire Dist. Council* v. *Millis*, 325 U.S. 697, 65 S. Ct. 1316, 89 L. Ed. 1877, reh. den. 326 U.S. 803, 66 S. Ct. 11, 90 L. Ed. 489. There is therefore nothing inherently unfair in the interstate hearing process which is designed to enlarge the claimant's opportunity to use the appeals process of the liable or paying state; and she has no basis of complaint unless, in application to her, due process is somehow, arbitrarily denied.

II. The Courts Below Were Correct in Dismissing the Claim for Failure to State a Claim upon Which Relief Could Be Granted.

It is clear that a single judge may deny the convening of a three-judge court under 28 U.S.C. §2281 or §2282 if the federal constitutional claim is insubstantial. It is equally clear that after the constitutional question is found to be insubstantial by a single judge, he may then proceed to decide the case on its merits. *Wicks* v. *S. Pacific Co.*, 231 F. 2d 130 (C.A. 9, 1956), cert. den. 351 U.S. 946, 76 S. Ct. 845, 100 L. Ed. 1471; *Sardino* v. *Fed. Reserve Bank of N.Y.*, 361 F. 2d 106 (C.A. 2, 1966), cert. den. 385 U.S. 898, 87 S. Ct. 203, 17 L. Ed. 2d 130. If a motion to dismiss for failure to state a claim is granted without leave to amend, it results in a judgment on the merits. *Mullen* v. *FitzSimmons & Connell Dredge & Dock Co.*, 172 F. 2d 601 (C.A. 7, 1948), cert. den. 337 U.S. 959, 69 S. Ct. 1534, 93 L. Ed. 1758; *Harman* v. *Valley Nat'l Bank*, 339 F. 2d 564 (C.A. 9, 1964); 2A Moore's Federal Practice, 2d ed., §12.09, p. 2313. The lower court's dismissal *on the merits* resulted from this Respondent's Motion to Dismiss for failure to state a claim upon which relief may be granted and not from a finding of lack of personal jurisdiction over any of the Appellees (Order, Vol. 1, p. 38).

The motion was based on the inability of the Respondents in this matter to grant the relief asked by the Petitioner. Only Congress could fashion such relief. The Petitioner failed to answer the motion below, and it was granted by the lower court. Petitioner, on appeal, has suggested possible relief from Respondents in the form of granting the New Mexico hearing officer the power to decide her interstate appeal. This, quite simply, isn't feasible because a New Mexico referee cannot decide a case governed by New York law and precedent and cannot order

the claimant to be paid benefits from New York's unemployment fund. If such a decision were ever made and then appealed, both the Employment Security Commission of New Mexico and the New Mexico courts would likewise be powerless to adjudicate rights in cases governed exclusively by New York law and to award benefits from a New York fund which is under the exclusive control of a New York agency and the New York legislature.

Petitioner, in her brief to this Court, makes much of the alleged "agency" relationship between the states of New York and New Mexico. Although in the interstate hearings process the state conducting a hearing for an interstate claimant is commonly referred to as "agent state" and the state against whom the claim is made, the "paying state," the procedures promulgated for interstate hearing by the Interstate Conferences of Employment Security Agencies actually confer no substantive power on the agent state to bind the paying state in any way, nor is there any understanding by the states that any such powers are to be conferred. The agent state agrees only to provide a forum for the convenience of the claimant, and the paying state agrees only to accept, at face value, the evidence produced in that forum subject to its power of interpretation and evaluation. There is then no agency in a legal sense which could serve as vehicle for the transfer of any powers from the paying state to the agent state which would contravene existing rules of jurisdiction. *Union Town Grocery Co. v. Dawson,* 68 W. Va. 332, 69 S.E. 845; Restatement, Agency (2d ed.), §6.

The lower court properly dismissed this action with prejudice after ruling that the constitutional question involved did not warrant the convening of three judges.

III. The Lower Court Properly Dismissed the Complaint for Failure to Exhaust Administrative Remedies.

Several important requirements are implied in the words "cases and controversies" which describe the extent of the federal judicial power in Article 3, and if any of these requirements is lacking, it may be raised as a jurisdictional point at any time during judicial proceedings on a claim. *McGrath* v. *Kristensen*, 340 U.S. 162, 71 S. Ct. 224, 95 L. Ed. 173; *Keller* v. *Potomac Elec. Power Co.*, 261 U.S. 428, 43 S. Ct. 445, 67 L. Ed. 731; *Public Utilities Comm.* v. *U. S.*, 355 U.S. 534, 78 S. Ct. 446, 2 L. Ed. 2d 470, reh. den. 356 U.S. 925, 78 S. Ct. 713, 2 L. Ed. 2d 760. Standing to bring a suit, exhaustion of administrative remedies, and presentation of a justiciable question are three such implied requirements which are very closely related. *U. S.* v. *Fed. Power Comm.*, 345 U.S. 153, 73 S. Ct. 609, 97 L. Ed. 918; *Joint Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U.S. 123 at 140, 71 S. Ct. 624 at 632, 95 L. Ed. 817; *Public Utilities Comm.* v. *U. S.*, supra. Each of these requirements also supports a proposition which precludes entertaining the Petitioner's claim. The determination of the validity or constitutionality of legislation in advance of its immediate adverse effect in the context of a concrete case involves too remote and abstract an inquiry for the proper exercise of the federal judicial power. *Int. Longshoremen's & Warehousemen's Union* v. *Boyd*, 347 U.S. 22, 74 S. Ct. 447, 98 L. Ed. 650. The interstate appeals hearing procedure available to the Petitioner and challenged by her in this case has as yet had absolutely no effect on her, much less an immediate adverse effect, because she hasn't used the process.

Turning first to the implied requirements of standing and presentation of a justiciable question, the Petitioner's

claim lacks both. The touchstone to justiciability is injury to some legally protected right. *Joint Anti-Fascist Refugee Comm.* v. *McGrath,* supra; *Greene* v. *McElroy,* 360 U.S. 474, 79 S. Ct. 1400, 3 L. Ed. 2d 1377; 2 Am. Jur. 2d, Ad. Law, §575. Although the Petitioner may have a legally protected right to a fair hearing, she has no standing to present a justiciable question as to that right until it has been injured, and since the interstate process is not inherently unfair, her rights cannot be injured until it is demonstrated by experience with the proceedings that she is in fact being denied due process. *Chapman* v. *Sheridan-Wyoming Coal Co.,* 338 U.S. 621, 70 S. Ct. 392, 94 L. Ed. 393; *Stark* v. *Wickard,* 321 U.S. 288, 64 S. Ct. 559, 88 L. Ed. 733. Whether or not the Petitioner will be subjected to a legal wrong cannot be determined until a specific denial of fundamental fairness is encountered or a decision is issued from the process she challenges, and there can be no certainty prior to that time as to whether she is being threatened with a legal wrong because a substantial number of ineligible interstate claimants who appeal their disqualifications are found eligible for benefits on their appeal. Had Petitioner completed the interstate appeals process and been held eligible for benefits, she would have neither been threatened with nor suffered a legal wrong, and her entire claim would be moot.

The requirements of standing and presentation of a justiciable question are not removed merely because Petitioner is seeking a declaratory judgment pursuant to 28 U.S.C. §2202. Invocation of §2202 requires the existence of "a case of actual controversy." *Aetna Life Ins. Co.* v. *Haworth,* 300 U.S. 227, 57 S. Ct. 461, 81 L. Ed. 617, 108 A.L.R. 1000, reh. den. 300 U.S. 687, 57 S. Ct. 667, 81 L. Ed. 889. A grievance that is insubstantial and speculative will not support a declaratory judgment. *Eccles*

v. *Peoples Bank*, 333 U.S. 426, 68 S. Ct. 641, 92 L. Ed. 784, reh. den. 333 U.S. 877, 68 S. Ct. 909, 92 L. Ed. 1153; *Richardson* v. *Perales*, 402 U.S. 389, 91 S. Ct. 1420, 28 L. Ed. 2d 842.

Petitioner asserts that she shouldn't be forced to comply with the third implied requirement of exhaustion because her suit goes "to the very heart of the process itself" and wouldn't be a proper action for the interstate appeals process to decide.

The general rule is that relief must be sought by exhausting a remedy provided by an administrative agency before the court will act. *Porter* v. *Investors Syndicate*, 286 U.S. 461, 52 S. Ct. 617, 76 L. Ed. 1226, aff'd on reh. 287 U.S. 346, 53 S. Ct. 132, 77 L. Ed. 354; *Lichter* v. *U. S.*, 334 U.S. 742, 68 S. Ct. 1294, 92 L. Ed. 1694; *Aircraft & D. Equipment Co.* v. *Hirsch*, 331 U.S. 752, 67 S. Ct. 1493, 91 L. Ed. 1796; *Tennessee Enamel Mfg. Co.* v. *Hoke*, 183 Tenn. 615, 194 S.W. 2d 468; *State ex rel. Emp. Sec. Comm.* v. *Kermon*, 232 N.C. 342, 60 S.E. 2d 580; Annotation: 14 A.L.R. 2d 838, §16. Petitioner cites *Public Utilities Comm.* v. *U. S.*, supra, in support of her assertion that exhaustion should not be required because she is raising a question concerning the constitutionality of agency procedure. In view of the reluctance of courts to pass on constitutional questions before it becomes necessary, the requirement of exhaustion cannot be eliminated solely by the fact that Petitioner urges the unconstitutionality of the interstate procedure. *Aircraft & D. Equipment Corp.* v. *Hirsch*, supra; *Tennessee Enamel Mfg. Co.* v. *Hoke*, supra; *State ex rel. Emp. Sec. Comm.* v. *Kermon*, supra. In *Allen* v. *Grand Cent. Aircraft Co.*, 347 U.S. 535, 74 S. Ct. 745, 98 L. Ed. 933, the court held that it would be premature for any court to rule upon questions concerning the interpretation and constitutionality of a statute until after exhaustion of the available administrative procedures. The court also expressed grave

doubts about the Petitioner's standing to test the validity of that procedure (347 U.S. 540, 74 S. Ct. 748, 98 L. Ed. 939).

There are also indications that Petitioner should be required to exhaust merely because her constitutional question is so insubstantial as not to require the convening of a three-judge court. *King* v. *Smith,* 392 U.S. 309 at 312, n. 4, 88 S. Ct. 2128 at 2131 n. 4, 20 L. Ed. 2d 1118.

The district court would have been justified in dismissing the complaint on a finding that any of these three implied requirements was lacking, and its holding that Petitioner should be required to exhaust was therefore proper. Moreover, in this situation, the standing requirement precludes Petitioner from bringing an action independent from and outside of the administrative procedures until she has exhausted.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

Constitution of the United States—Fourteenth Amendment:

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C.A., 503 (a) (3)

(a) The Secretary of Labor shall make no certification for payment to any State unless he finds that the law of such State, approved by the Secretary of Labor under the Federal Unemployment Tax Act, includes provision for . . .

(3) Opportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied; and . . .

28 U.S.C.A., 1254 (1)

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . .

42 U.S.C.A., 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress.

APPENDIX B

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

SEPTEMBER 1972 TERM

DOROTHY DAVIS BARR, Individually and for and on behalf of all others similarly situated,
Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA, James D. Hodgson, Secretary, Department of Labor; EMPLOYMENT SECURITY COMMISSION OF NEW MEXICO, Louis R. Bachicha, Chairman-Executive Director; NEW YORK STATE DEPARTMENT OF LABOR, Louis L. Levine, Industrial Commissioner,
Defendants-Appellees.

No. 71-1740

Appeal from the United States District Court
for the District of New Mexico

(Filed April 30, 1973)

William J. Torrington, Bernalillo, New Mexico, for Appellant.

Ronald R. Glancz (L. Patrick Gray, III, Assistant Attorney General, Victor R. Ortega, United States Attorney, Morton Hollander, Thomas J. Press, Attorneys, Department of Justice, Washington, D. C. 20530, on the brief) for Appellee United States.

R. Baumgartner, Attorney for Employment Security Commission of New Mexico, Albuquerque, New Mexico, Appellee.

Before JONES*, SETH and BARRETT, Circuit Judges.

JONES, Circuit Judge:

The appellant, Dorothy Davis Barr, brought an action in the District Court for the District of New Mexico against the United States and the Secretary of Labor; the Employment Security Commission of New Mexico and its Chairman-Executive Director; and against the Industrial Commissioner of the New York State Department of Labor. Federal jurisdiction is asserted under 28 U.S.C.A. § 1346 (a) (2), 28 U.S.C.A. § 1361, 42 U.S.C.A. § 1983, 42 U.S.C.A. 1988, 28 U.S.C.A. §§ 2210-2202, and Rule 57 Fed. Rules Civ. Proc. The appellant undertook to sue individually and on behalf of a class consisting of all other persons similarly situated.

In her complaint the appellant alleged that she had terminated an employment in New York, moved to New Mexico, filed a claim with the Employment Security Commission of New Mexico for unemployment insurance benefits under the laws of New York; that New York had rejected her claim on the ground that she had left her employment voluntarily. She was informed, so it was alleged, that pursuant to the interstate appeals procedure, a New Mexico referee would take and record her testimony and receive any other evidence she desired for trans-

*Of the Fifth Circuit, sitting by designation.

mission to New York where a referee of that state would consider such testimony and evidence with the evidence brought before him by the former employer and make a decision. The appellant asserted that she was entitled to require the employer's witnesses to be subpoenaed and brought, for the taking of their testimony, from New York to New Mexico where they would be subject to cross-examination by her. She claimed that to follow the procedures as outlined by the two states, although in accordance with the interstate appeals agreements and the pertinent state regulations, would result in a denial of her constitutional due process rights and of the Federal statute which requires that "the Secretary of Labor shall make no certification for payment to any State unless he finds that the law of such State . . . includes provision for . . . opportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment are denied . . ." 42 U.S.C.A. § 503(a). He claim was also predicated upon the statutory requirement that unemployment compensation should not be denied to a claimant or reduced ". . . solely because he files a claim in another state . . . or because he resides in another state . . . at the time he files a claim for unemployment compensation." 26 U.S.C.A. § 3304(a) (9) (A). The prayer of the complaint sought "the Court's order for declaratory relief and an injunction enjoining the Secretary of Labor, the Employment Security of New Mexico, and the New York State Department of Labor, from further failing, refusing, or neglecting to provide claimants with an opportunity for a fair hearing before an impartial tribunal or Court in claimant's domicile . . . ."

After obtaining leave to proceed in forma pauperis, the appellant filed a double-barreled motion seeking first, leave to proceed under Rule 23 Fed. Rules Civ. Proc. as the representative of a class consisting of interstate claimants

of unemployment compensation benefits, and second, the convening of a three-judge court as provided by 28 U.S.C.A. §§ 2281, 2282 and 2284.

The court granted the motion of New York State Industrial Commissioner to dismiss the complaint for lack of jurisdiction, the motion of Employment Security Commission of New Mexico and its Chairman-Executive Director to dismiss the complaint for failure to state a claim upon which relief could be granted, and the motion of the United States and its Secretary of Labor to dismiss the complaint for failure to exhaust administrative remedies and failure to state a claim upon which relief could be granted. The court also ordered that the complaint and the cause of action be dismissed with prejudice as to all defendants. This appeal followed.

The New Mexico Commission has filed in this Court a motion reciting that the appellant has ceased to be a resident of New Mexico and seeking the dismissal of the appeal as moot. Attached to the motion is a copy of a writing purporting to be a letter from the appellant to her attorney. In this instrument the writer gives her "home address" as a street number in Helena, Montana. In the letter its writer talks about her "job". The letter is the sole basis for the assertion of mootness. Assuming the authenticity of the letter which, although not admitted, is not denied, it fails to establish that there has been, in fact, a change of residence. We do not find it necessary to decide whether a change of residence would deprive the appellant of any right afforded her under interstate appeals procedures. She had a right to invoke the jurisdiction of the New Mexico Commission at the time she sought relief from it, and we need not decide whether the right has been lost, however mistaken she was as to the nature and extent of her rights in the interstate proceedings. We suppress the urge

to discuss the doctrine of mootness and proceed to the issues which were decided by the district court.

Jurisdictional questions are usually entitled to initial consideration, and are to be noticed whether or not they are raised. The United States was dismissed on the grounds that administrative remedies had not been exhausted and for failure to state a claim upon which relief could be granted. We pretermit consideration of the administrative remedy question. This Court has had no greater success than did the district court in finding any basis for a claim upon which relief could be granted against the United States. It seems clear that there is no jurisdiction over the United States. The appellant asserted jurisdiction under 28 U.S.C.A. § 1346(a)(2), 28 U.S.C.A. § 1361, 42 U.S.C.A. § 1983, 42 U.S.C.A. § 1988, 28 U.S.C.A. §§ 2201-2202 and Rule 57 Fed. Rules Civ. Proc.

Section 1346(a) (2) gives to district courts concurrent jurisdiction with the Court of Claims in a limited amount. The statute is applicable only to money claims against the United States. United States v. Jones, 131 U.S. 1, 19 S.Ct. 669, 33 L.Ed. 90. The district court was correct in its determination that no claim was asserted against the United States upon which relief could be granted, but the complaint might well have been dismissed against it on jurisdictional grounds.

Section 1361 confers jurisdiction "in the nature of mandamus to compel an officer . . . of the United States . . . to perform a duty owed to the plaintiff." The functions of the Secretary of Labor in relation to state administration of unemployment compensation laws and regulations are, to the extent the appellant would have the Secretary coerced by the court, discretionary. Mandamus, including the statutory remedy provided by Section 1361, will not lie to direct the manner in which discretionary acts of gov-

ernmental officials are to be performed nor to direct or influence the exercise of discretion in making such decisions. McQueary v. Laird, 10th Cir. 1971, 449 F.2d 608. No other relief was sought against the Secretary. The district court was correct in its determination that the complaint stated no claim against him upon which relief could be granted.

The Industrial Commissioner of the State of New York was dismissed by the district court for lack of jurisdiction. The decision was correct. Service of process was attempted by certified mail. No authorization for such service is provided by any statute or rule of the United States or of the State of New Mexico. See Rule 4(f) Fed. Rules Civ. Proc.

The complaint named as defendants the New Mexico Employment Security Commission and its Chairman-Executive Director. As to them the complaint was dismissed on the ground that no claim was stated upon which relief could be granted. Although the complaint is not free of ambiguity, it is apparent that the appellant sought to have the New Mexico Commission subpoena witnesses from New York to appear personally before it, to conduct a hearing, to make findings and enter an order against the State of New York for the payment of unemployment compensation to her. As to this position it is enough to say that there is nothing in the law of the United States, of New York or of New Mexico that authorizes such procedure. The interstate appeals procedure permits the taking of testimony before the Commission in the state of a claimant's residence and the transmitting of such testimony to the state against which the claim is asserted. With this the appellant was not content; but to more she was not entitled.

Only brief consideration need be given to the other statutes upon which the appellant relies. Section 42

U.S.C.A. § 1983 provides a Federal remedy for a denial or deprivation of a federally protected right by a state or state agency. The failure of New Mexico to provide a forum to adjudicate a claim against the state of New York is not within the purview of Section 1983. Reliance upon 42 U.S.C.A. § 1988 is also misplaced. This section does not create rights nor confer jurisdiction. Declaratory judgment relief is made available to Federal litigants by 28 U.S.C.A. §§ 2201-2202 and Rule 57 Fed. Rules Civ. Proc. They do not create jurisdiction.

The district court properly refused to treat this as a class action and properly rejected the application for the convening of a three-judge court.

The judgment of the district court is correct. It is AFFIRMED.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-171

DOROTHY DAVIS BARR, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

Petitioner, while residing in New Mexico, sought unemployment insurance benefits from New York. She contends that the interstate appeals procedure, under which her testimony could have been taken in New Mexico and sent to New York for consideration, did not afford her a fair hearing; she therefore seeks to enjoin further payments by the Secretary of Labor of state administrative expenses under 42 U.S.C. 503(a)(3).

After leaving her employment in New York, petitioner moved to New Mexico, where she filed a claim for unemployment insurance benefits under the New York Unemployment Insurance Law.[1] Pursuant to the "Interstate Benefit Payment Plan" ("Interstate Plan"), a multi-state agreement to which both New York and New

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[1] She apparently subsequently moved to Montana (Pet. App. A6).

Mexico have subscribed, the New Mexico Employment Security Commission, with whom petitioner's claim had been filed, transmitted the claim to the New York Department of Labor for determination.[2] The Industrial Commissioner of the State of New York ruled that petitioner was not entitled to benefits since she had left her last job without good cause, and notified petitioner that she had the right to appeal this decision. Under New York Law, petitioner had the right on appeal to a full and complete hearing in New York State. In addition, pursuant to the Interstate Plan, petitioner could testify before a referee in New Mexico; that testimony, and any other supporting evidence submitted by petitioner, would be forwarded to New York officials for consideration in determining her appeal (Record on Appeal, p. 18).[3]

Without exercising her administrative appeal rights, petitioner commenced this action for declaratory and injunctive relief against the United States and the Secretary of Labor of the United States and against New York and New Mexico officials. The complaint alleged that, in view of the distance between New York and New Mexico, petitioner could not attend a New York hearing and that the procedures in New Mexico were insufficient since her appeal would be decided by officials in New York. These circumstances, petitioner alleged, deprived

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[2] Under the Interstate Plan and implementing regulations, the State in which a claim is filed ("agent state") provides a forum for the convenience of the parties who have left the State against which the claim is filed ("liable state"). The latter accepts as authentic the evidence received by the agent state and renders a decision on the basis of that and other evidence in the record.

[3] A copy of the record on appeal has been lodged with the Clerk of this Court.

her of due process of law and violated her right to a fair hearing under 42 U.S.C. 503(a)(3) (Record on Appeal, pp. 6-7).[4]

The district court granted each defendant's motion to dismiss the complaint. The court of appeals affirmed the district court's ruling that the complaint failed to state a claim upon which relief against the federal defendants could be granted.[5] It also concluded that the complaint against them might have been dismissed on jurisdictional grounds.[6]

1. Since petitioner worked and earned her wage credits in New York State, her right to unemployment insurance benefits arises under the law of New York. Even though petitioner subsequently moved to New Mexico, New York law still accords petitioner the opportunity for a full hearing in New York State on her appeal; it therefore satisfies the "fair hearing" requirement of 42 U.S.C. 503(a)(3). The additional procedures available under the Interstate Plan represent a reasonable effort to provide a convenient method for the assertion of

[4] 42 U.S.C. 503(a)(3) provides that the Secretary of Labor shall not certify administrative payments to state programs unless he finds that the state law provides "[o]pportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied * * *."

[5] The court of appeals affirmed the district court's dismissal of the complaint against New York officials for lack of jurisdiction, and against New Mexico officials for failure to state a claim upon which relief could be granted (Pet. App. A3-A9).

[6] The court below also approved the district court's ruling that petitioner had not met the requirements of Fed. R. Civ. P. 23, entitling her to maintain the suit as a class action and that a three-judge court was not required because of the want of a substantial federal question (Pet. App. A9). It found it unnecessary to rule on New Mexico's suggestion that the appeal was mooted by petitioner's move to Montana (Pet. App. A6).

petitioner's claims in her subsequent domicile, while recognizing that jurisdiction over the claim and the employer remains exclusively in New York.[7] There are simply no statutory provisions giving New Mexico jurisdiction over either the claim or the New York witnesses, nor any constitutional necessity for such provisions. Cf. *Hanson* v. *Denckla*, 357 U.S. 235, 250-254.[8]

2. This case raises no issues concerning the scope of the mandamus statute (28 U.S.C. 1361) warranting review by this Court. Even under petitioner's interpretation of that statute, actions lie only where there is "a clear violation of an ultimate existing legal duty owed the plaintiff" (Pet. 9). But here, the Secretary's legal duty was to certify administrative payments if the state procedures provided an "[o]pportunity for a fair hearing * * * for all individuals whose claims for unemployment compensation are denied" 42 U.S.C. 503(a)(3). Assuming that such a limitation establishes a legal duty owed to plaintiff, there was no violation of that duty, since an opportunity for a full hearing was provided to petitioner, and all other claimants whether resident or non-resident, by New York. The statute contains no requirement concerning the location of the hearings, and none may be implied.

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[7] While the court below did not find it necessary to reach the district court's ruling that petitioner should have exhausted her administrative remedies (Pet. App. A6-A7), petitioner's failure to make use of available procedures to appeal the denial by New York of her claim leaves her contention that those procedures were inadequate, an unsupported speculation.

[8] Although petitioner denies that she is attempting to assert that New Mexico has jurisdiction over her claim and may compel the attendance of the employer's witnesses (Pet. 3), it is difficult to see how otherwise New Mexico can provide the full hearing she desires (Pet. 4).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1973.